IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 4:05-cv-00329-GKF-PJC**
	)	
TYSON FOODS, INC., *et al.*,	)	
	)	
Defendants.	)	
	)	

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO EXTEND THE APRIL 16 DISCOVERY DEADLINE FOR CERTAIN SPECIFIED DEPOSITIONS [DKT # 1946]

Defendants respectfully submit this reply in support of their Motion to Extend the April 16 Discovery Deadline for Certain Specified Depositions [Dkt # 1946] ("Motion"). Plaintiffs' response makes clear that Plaintiffs are willing to agree to specific extensions of the April 16 discovery deadline only when it benefits them. This one-sided approach to scheduling is contrary to the spirit of cooperation and good faith, and contrary to the Rules of Civil Procedure. Defendants regret the need to bring these basic scheduling matters before the Court and request the assistance of the Court.

I. Plaintiffs' Damage Experts

Plaintiffs' discussion of the depositions of their damage experts starkly demonstrates the problem that defendants confront. Plaintiffs inform the Court that the parties are willing to schedule the deposition of David Payne on April 27-28. *See* Resp. at 4-5. Indeed defendants have already agreed to do so. *See* Ex. 1, e-mail chain between D. Ehrich and L. Ward. But Plaintiffs make clear in their response that this agreement is not the product of the mutual scheduling accommodations that are expected of all members of the bar. Rather, as plaintiffs

candidly admit in their response, they have agreed to schedule the Payne deposition after April 16 only because they want to use that time to seek additional information from defendants for Payne to utilize in his deposition. *See* Resp. at 5. Plaintiffs admitted as much to defendants, as well. *See* Ex. 1.[1]

While defendants have agreed to schedule the Payne deposition on the dates plaintiffs propose, plaintiffs are not willing to extend the same courtesy on their other damage experts. Plaintiffs claim that they have made these other experts available for deposition on repeated occasions. Resp. at 3-4. But plaintiffs fail to note that they have refused to provide adequate detail regarding which of their seven damages experts will testify (and which of them will testify on which topics). Instead, plaintiffs have taken the unreasonable position that defendants must take seven depositions in order to try to guess which of plaintiffs' damage experts will testify at trial and on which topics. *See* Ex. 2, e-mail chain between D. Ehrich and C. Xidis. It is unreasonable to think that the Court would allow plaintiffs to present seven testifying witnesses on a single expert report, and plaintiffs' effort to conceal the facts about the work performed by each specific expert and the person who will present that information is improper. Defendants have repeatedly conferred with plaintiffs seeking the basic information required by Rule 26, but to no avail. *See id*. Accordingly, defendants have been forced to file a motion to compel the production of this information. *See Motion to Compel Complete Expert Disclosures* [Dkt #1940]. Plaintiffs seek to use the April 16 discovery deadline to moot this motion before it can be addressed by the Court.

[1] Plaintiffs' attempt to change Mr. Payne's testimony at this stage of the litigation is improper. Defendants have already complied with the Court's order to produce information for Mr. Payne's use and the deadline for his opinions has long since passed. But these objections did not stop defendants from agreeing to a mutually convenient time for Mr. Payne's deposition.

II. Plaintiffs misrepresent defendants' attempts to obtain discovery concerning "response costs"

Plaintiffs suggest that defendants have not been diligent in seeking discovery on the state's alleged "response costs." Contrary to this argument, defendants have been most diligent in seeking discovery into plaintiffs' alleged damages, and in particular response costs, since the commencement of discovery. Defendants served discovery requests on the State seeking information pertaining to the State's response costs as early as August 22, 2006. *See* Ex. 3, E-mail from D. Ehrich to C. Xidis, 3/20/09, setting forth examples of such discovery requests. The Cargill Defendants alone made multiple requests for supplementation. *See* Ex. 4, Letter from B. Jones to D. Page and R. Garren dated 10/17/08. It appears that plaintiffs mailed a partial supplementation addressing response costs on April 2, 2009, but defendants have not yet received the documents.

Plaintiffs identified witnesses who may testify concerning "response costs" for the first time on February 19, 2009 when they produced their final fact witness list. Defendants promptly took the deposition of Janet Stewart, the first witness designated to testify regarding "response costs" on March 20, 2009. Despite this designation, Ms. Stewart was not prepared to testify on the subject of "response costs" allegedly incurred by Oklahoma Conservation Commission. Ex. 5, Deposition of Janet Stewart, March 20, 2009, P. 41, ll. 12 – 24; and P. 55, l. 20 – P. 56, l. 14. Despite nine years with Oklahoma Department of Agriculture, Food & Forestry, Ms. Stewart had no knowledge of any "agency response costs" allegedly incurred by ODAFF. *Id*. at P. 36, l. 20 – P. 37, l. 3. Despite the Cargill Defendants' discovery and multiple requests for supplementation, Ms. Stewart advised that the OCC had just commenced gathering documents relating to response costs that week. *Id.* at P. 23, ll. 2-12.

Plaintiffs further suggest that defendants seek to depose the remaining 11 fact witnesses on the issue of response costs. *See* State's Response, Dkt. 1957, fn. 3. But this is also incorrect. The parties entered into an agreement the day before plaintiffs filed their response brief. Under that agreement, plaintiffs will withdraw their designation of nine witnesses who are listed on plaintiffs' fact witness list under the topic "response costs." Plaintiffs will present the remaining three witnesses for deposition pursuant to defendants' 30(b)(6) notice on response costs. In light of plaintiffs' agreement to withdraw these fact-witness designations, defendants agreed that taking the nine depositions would not be necessary. *See* Ex. 6, T. Hill e-mail to R. Nance and T. Hammons, 4/2/09. Accordingly, the "response cost" issue has been resolved.

IV. Quang Pham

Plaintiffs' response admits that Dr. Pham is out of the country until after the April 16 deadline. Resp. at 5. Plaintiffs argue that defendants improperly delayed by issuing a notice on March 19 for Dr. Pham's deposition. *Id.* Issuing a deposition notice a month in advance is not undue delay. Moreover, plaintiffs are once again seeking to apply a double standard of scheduling cooperation. Plaintiffs have issued multiple deposition notices in the last few days alone, all for depositions that plaintiffs would like to conduct before April 16.

V. Cargill's Rule 30(b)(6) deposition of the State

Contrary to plaintiffs' suggestion, the offer of a designee to appear on April 13 is inadequate to respond to the Cargill Defendants' Rule 30(b)(6) notice. First, the scope and length of the deposition of the State as to Cargill-specific information depends critically on the outcome of the plaintiffs' motion for protective order and Cargill's motion to compel the state to respond to discovery requests seeking whether the State has any specific information to support its allegations against Cargill. If, as Cargill urges, the Court grants to the motion to compel and

denies the State's motion for protective order, the State would be required to provide the discovery responses. Then Cargill would require some time to assess the responses to determine they are adequate and to prepare finally for the deposition. Although Cargill would make diligent efforts to do that promptly, it cannot agree that it would have sufficient to do so by April 13. Second, although plaintiffs contend that they can present a witness for a one day deposition on April 13, the State cannot unilaterally set the length of the State's deposition at one day. Once again plaintiffs seek to impose a double standard. In connection with plaintiffs' Rule 30(b)(6) depositions of Cargill, plaintiffs insisted they were entitled to a seven hour deposition as to each designee Cargill presented on the multiple topics that plaintiffs noticed and, as a result, plaintiffs spent several days deposing the Cargill deponents. Fairness requires Cargill be afforded a similar opportunity to examine the State's designees.

VI. Defendants have been diligent and seek a limited extension out of genuine need

The main thrust of plaintiffs' response is that defendants can easily do more before April 16. In the *Motion to Extend*, defendants point out that it is not practicable to take the depositions for which they request a brief extension, noting that there are more than 50 depositions scheduled between April 1 and April 16 in this case. This schedule results in the parties needing to defend or take multiple depositions at the same time on many days. This double- and triple-tracking is efficient, but has its limits as each defendant is represented by their own counsel.

In the hope that it will be helpful to the Court, defendants attach their current calendar of pending depositions in the case (both plaintiffs' and defendants'). *See* Ex. 7. This calendar demonstrates graphically the impracticality of taking the specific depositions discussed in the *Motion to Extend* before April 16.

At this point, defendants are seeking extensions only for the plaintiffs' seven damage experts, Dr. Pham, and the Cargill 30(b)(6) deponents. Defendants respectfully submit that these limited extensions should be granted.

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